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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1970

No. 1059

BERNARD J. CHUBET, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Eighth Circuit

BERNARD J. CHUBET, JR.
116 East 58th Street
New York, New York 10022
Petitioner

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit

in this case, entered on August 11th, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A, infra) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11th, 1969. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

(1) Whether, under the ruling in Douglas v. Alabama, 380 U.S. 415, 13 L.ed.2d 934, 85 S.Ct. 1074 (1965), the "confrontation clause" of the Sixth Amendment was violated when the prosecution, in the guise of an opening statement enumerated all of the testimony of the government's star witness, which was necessary in order to tie together all of the other testimony presented, and around which and about which all other prosecution witnesses testified, and then willfully failed to produce the government's star witness for examination and cross-examination.

(2) Whether, under the ruling in Escobedo v. Illinois, 378 U.S. 478, 12 L.ed.2d 977, 84 S.Ct. 1758 (1964), at the crucial point, before the accused commits the intended crime, he must be warned of his privilege against self-incriminationand his right to counsel, thus

making it legally impossible for a suspect to be helped to commit a crime by a government agent.

(3) Whether 21 USC 372(e)(5), which permits agents of the Bureau of Drug Abuse Control to seize without libel or warrant, drugs, devices and other material if the agents have reasonable grounds to believe that said items are subject to seizure and condemnation under the provisions of 21 USC 334(a)(2) is a direct violation of the Fourth Amendment which states that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was found guilty as charged on each count of an eleven count indictment and sentenced to one year imprisonment on each count -- Counts I through V to be served concurrent with Count I; Counts VII through XI to be served concurrent with Count VII; and, Count VI to be served consecutive to Count I.

The first Count of the Indictment charged John R. Kauffmann, Darly L. Keith, Anthony S. Chang and Bernard J. Chubet, Jr. with conspiracy to violate 21 USC 360(a)(b) and 21 USC

331(q)(2). That Count set forth certain acts which these defendants are alleged to have done in furtherance of the conspiracy to sell and deliver controlled drugs contrary to the provisions of the above cited statutes, including certain sales of amphetamine tablets and the falsifying of certain records for the export of amphetamine tablets.

Count Two of the Indictment alleged that the above four persons unlawfully sold and delivered 50,000 dl-amphetamine tablets to a government agent at Bridgeton, Missouri on February 1, 1967.

Count Three charged that those defendants unlawfully possessed 50,000 dl-amphetamine tablets on Februafy 1st, 1967, for the purpose of sale.

Court Four of the Indictment charged the unlawful sale and delivery of 50,000 dl-amphetamine tablets to a government agent on February 5th, 1967, by Kauffman, Keith, Chang and Chubet.

Count Five of the Indictment alleged the unlawful possession with intent to sell by said four persons of 50,000 dl-amphetamine tablets on February 5th, 1967.

Counts Six and Seven charged Beulah Kauffman, along with Kauffman, Chubet, Chang and Keith with the unlawful sale and delivery and unlawful possession with intent to sell, respectively, 100,000 dl-amphetamine tablets to a government agent on March 8th, 1967, at Imperial, Missouri.

Counts Eight and Nine charged Henry G.

Geerdes with Kauffman, Chubet, Chang and Keith, with the unlawful sale and delivery and unlawful possession with intent to sell, respectively, of 100,000 dl-amphetamine tablets to a government agent on March 8th, 1967, at Wentzville, Missouri.

Counts Ten and Eleven charged Emerson S. Jared with Kauffman, Chubet, Chang and Keith with the unlawful delivery and unlawful possession with intent to sell, respectively, of 100,000 dl-amphetamine tablets to a government agent on April 3rd, 1967, at Wentzville, Missouri.

The trial was commenced on Monday, November 27th, 1967, before a jury in the Court of Honorable Roy W. Harper, District Judge.

Mr. Anthony K. S. Chang did not appear for trial. Mr. Henry G. Geerdes entered a plea of nole contendere, which plea was accepted by the Court (R.9).

The Government's evidence established that the sales and deliveries in the approximate amounts set forth in Counts II, IV, VI, VIII and X were made. Defendant, Kauffmann admitted that he made three of the deliveries as charged in Counts II and VI and VIII and that the others were, or probably were, made as charged in the other Counts of sale and delivery. Appellant Kauffmann, however, contended that the sales and possession of the amphetamine tablets were done as the result of an unlawful entrapment designed and executed by agents of the Bureau of Drug Abuse Control, an agency of the United States Government. Appellant denied that he had entered into any conspiracy with

anyone, as charged in Count I of the Indictment.

Mr. Irvin L. Ruzicka, Assistant U. S. Attorney, represented the Government at the trial of this cause. In his opening statement to the jury (R. 29-39), Mr. Ruzicka told the jury what the Government would prove and whom he would call as witnesses to prove the alleged charges. Among those persons who Mr. Ruzicka said would testify was a person by the name of Jerry Miller (R. 37) whose real name is Dallas Barr and who worked as an informant for the Bureau of Drug Abuse Control (R. 48).

The Government presented as its first witness, Clifford C. Elliott, an agent for the Bureau of Drug Abuse Control (R. 47) who testified that he was working undercover from December 30, 1966 to April 3, 1967, and that he met John Kauffmann on December 30, 1966. He testified that Kauffmann told him he had a tableting machine and would be in production by the 15th (R. 50). He again met Kauffmann on January 31, 1967, and at that time Kauffmann told him that he had just spoken on the phone to New York concerning his export numbers (R. 51). Kauffmann also told him he was the owner of Fixaco Company and that he had a distribution number and was licensed to handle any type of drugs (R. 50). Elliott testified Kauffmann told him he was going to pick up 200,000 amphetamine tablets on the following day and that he had a million on order (R. 51). Elliott said that Kauffmann told him that as he (Kauffmann) was owner of Fixaco Company, he would purchase drugs and make arrangements to have the record show that they were distributed and shipped to Formosa, when

in fact he would be selling them in the U. S. (R. 52).

Elliott testified that on February 1, 1967, he met Kauffmann and Miller in the parking lot at Holiday Inn North in Bridgeton, Missouri. He said he offered Kauffmann $750.00 but Kauffmann told him he didn't want it and to give it to Jerry Miller (R. 53). Elliott, Miller and Kauffmann then went to the rear of Kauffmann's car where Miller and Elliott removed approximately 50,000 white tablets from a box (R. 53). Elliott then handed Miller $750.00 in cash. Elliott further testified that he met Kauffmann again on February 5, 1967, at Kauffmann's house and that Kauffmann introduced him (Elliott) to Chang and Chubet (R. 58). Elliott stated that Chang showed him brochures and a few small items which he intended to import from Formosa, and that Chubet told him he was going to set up the records for the overseas shipment of the drugs (R. 59). Elliott said he picked up 50,000 tablets at Kauffmann's house on that date (R. 60). Elliott said that he attempted to give Kauffmann $750.00 for the tablets but Kauffmann said he would get an envelope and Elliott could leave it for Miller (R. 60).

Elliott further testified that he saw Kauffmann again on February 22, 1967. Chubet was also there (R. 61) and again on February 24, 1967 (R. 62). Elliott again saw Kauffmann on March 8, 1967, when Mr. Chang and Mr. Keith were present (R. 69). Elliott identified Government Exhibits 4 and 5 which he said were tablets he purchased on March 8, 1967, at Kauffmann's house from Mrs. Kauffmann (R. 81).

Elliott then testified about certain boxes

which he seized from Kauffmann's house on April 3, 1967 (R. 83) over the objection of Kauffmann's counsel and after counsel's renewed motion to suppress was overruled by the Court (R. 82).

The next Government witness was Lee D. Hughes, an agent for the Bureau of Drug Abuse Control. Mr. Hughes testified that he received 100,000 white tablets from Henry Geerdes on March 8, 1967, at Wentzville, Missouri (R. 174-175). Hughes also testified that on April 3, 1967, he met Kauffmann and Jared at Wentzville, Missouri, and was supposed to purchase amphetamine tablets at that time (R. 179). Hughes took several boxes from Kauffmann's car and subsequently arrested him (R. 181).

Harold Leap, an agent for the Bureau of Drug Abuse Control, testified he observed the transfer of drugs from Kauffmann's car to Elliott's car on February 1, 1967 (R. 204). He also testified that he purchased a package from Kauffmann on February 21, 1967, at Columbia, Missouri, and that he paid Kauffmann $300.00 (R. 207). He identified Government Exhibit 20 as that package (R. 208). On cross-examination of Mr. Leap by Mr. Palmer, Mr. Leap testified that Fixaco Company was owned by Mr. Kauffmann (R. 255).

The Government then called Charles Kriedel, an agent for the Bureau of Drug Abuse Control, who testified he had purchased three small cartons from Kauffmann on February 21, 1967, at Blue Springs, Missouri (R. 275-276).

Agent John L. Arntz, of the Bureau of Drug Abuse Control, next testified that he had been

present at the sale by Kauffmann and Kriedel of February 21, 1967, and that he had taken pictures of the transaction from the back of a truck (R. 305-306).

Agent Willard Rutledge of the Bureau of Drug Abuse Control testified he observed the transaction between Kauffmann and Leap at Columbia, Missouri, on February 21, 1967 (R. 321). He further testified that on March 13, 1967 he and agent Leap drove to the C.E.S. Truck Line in Crystal City, Missouri, where he observed two 55 gallon drums sitting on the dock (R. 322). He identified Government's Exhibits 25 and 26 as those drums (R. 323). Agent Rutledge further testified that on April 3, 1967, he accompanied Emerson Jared to his place of residence in House Springs, Missouri, where he seized four cartons of drugs (R. 323-324) which were marked Government's Exhibits 27, 28, 29 and 30.

The Government next called Richard E. Olson, Yvonne Henrietta Pfabe and Martin L. Dow, chemists for the Food and Drug Administration, who testified they had examined the tablets from the various Government Exhibits and that they contained dl-amphetamine sulphate.

Agent John Sopsic of the Chicago office of the Bureau of Drug Abuse Control testified he had come from Chicago on September 23, 1967, and met with Miller and Kauffmann at the St. Louis Airport (R. 473) and that they discussed the sale of amphetamine tablets Kauffmann was planning to manufacture (R. 473). He further testified that Kauffmann phoned him on March 19 and 20 about amphetamine (R. 476).

Curtiss L. Dixon, an agent of the Bureau

of Drug Abuse Control, stated he had a conversation with Kauffmann on December 1, 1966, at which time the subject of amphetamine manufacture was discussed (R. 522).

Mr. Joseph P. LeBoube, an employee of C.E.S. Truck Lines in Crystal City, Missouri, testified he met Kauffmann and another man at this office on March 13, 1967 (R. 536). At that time, Kauffmann gave the witness the necessary information to ship two barrels (R. 538). He identified Government's Exhibits 25 and 26 as the barrels in question. He also stated that a few days prior to March 13 another man whom he couldn't identify came to his office concerning the barrels, but did not have sufficient information (R. 537).

John Marano, terminal manager for Spector Frieght System in New York, testified that two blue metal drums were received on March 19, 1967 (R. 569). He said he had been alerted to watch for the drums (R. 570). He said that several days later he was visited by agent deLorenzo and agent Miller at which time the drums were opened and he saw a blue plastic bag filled with white pills and the rest of the drums filled with cement or cinderblock (R. 570-571).

On cross-examination, Marano said he had been alerted by deLorenzo to watch for the drums (R. 572). Marano also testified that the drums were opened on March 21 and not March 19 (R. 574).

Francis J. Miller, an agent for the Bureau of Drug Abuse Control in New York, testified that he went with other agents to Spector on March 21, 1967, at which time the seals on two 50 gallon

drums were broken (R. 583). When opened, the drums were found to contain black plastic bags with tablets inside (R. 584). Beneath the plastic bags were cement bags. Miller further testified that he had knowledge, received from Kansas City or St. Louis, that the drums were in transit (R. 586). He further said that the people who notified them said there were possibly cement bags in the drums (R. 587). Miller testified that he was not looking for adulterated drugs, and that what he was interested in was finding out what was in the drums (R. 591).

Agent Robert Brown of the Bureau of Drug Abuse Control in New York, testified as to the opening of the drums on March 21, 1967, and identified Government's Exhibits 52-57, which he said were pictures he took of the contents of the drums (R. 601).

Leonard Einbinder, an agent for the Bureau of Drug Abuse Control in New York, testified he made an executive seizure of the two barrels at Rietman's Trucking Company on April 4, 1967 (R. 608), and that he left the two drums there. The Government presented no evidence as to what happened to the barrels from the time of the seizure on April 4, 1967, to the date of the trial.

John R. Kauffmann, the co-defendant herein, testified in his own behalf. He testified that he owned Fixaco Company for approximately 20 years and that he had to obtain a Government registration number prior to January, 1967, when the new law went into effect (R. 275). Kauffmann stated that he had been in numerous businesses and that the manufacture and sale of Fixaco was not his main business (R. 275).

Kauffmann said that he met Jerry Miller in July or August, 1966, through a waitress who lived on one of his properties (R. 728). He said Miller told him he was an ex-convict and he needed something to do (R. 279). Kauffmann advised him he was going to start importing items which Miller could sell (R. 730). Kauffmann met with Miller several times afterward and he denied that there was any mention of drugs.

Kauffmann admitted meeting agent Sopsic at the St. Louis Airport on September 23, 1966, but that amphetamines were not mentioned (R. 732). Kauffmann said he talked with Sopsic about the purchase and sale of imported items.

Kauffmann met with Miller several times from September 23, 1966, until the early part of December, 1966, when Miller introduced Kauffmann to agent Dixon (R. 733). Kauffmann denied that there was any mention of amphetamine at that meeting (R. 735).

Kauffmann testified that sometime in December, 1966, Miller asked him if he would sell Fixaco Company to him and Kauffmann said he would for $5,000.00 (R. 738).

On December 30, 1966, Miller came to Kauffmann's house and had agent Elliott with him. Miller told Kauffmann that he and Elliott were going into business together (R. 739). Sometime after the December 30, 1966, meeting, Miller asked Kauffmann if Kauffmann had a drug license for Fixaco. He testified that he didn't know and went to look it up (R. 740). Kauffmann said Miller asked him in January if Kauffmann could get price quotations for him on amphetamine and

aspirin (R. 741). At Miller's suggestion, Kauffmann called Shaw Pharmacal Company and got the quotation from Keith (R. 742). On February 1, 1967, Kauffmann purchased 200,000 amphetamine tablets from Shaw at the request of Miller who said that Elliott had places for them (R. 743). Kauffmann also stated that Miller gave him the money for the purchase of the tablets and 50,000 aspirin (R. 744). Kauffmann was accompanied to Shaw on that date by Miller where they picked up the tablets (R. 745). Kauffmann then related what happened at the Holiday Inn North, which was substantially similar to the testimony given by agent Elliott (R. 746-747). On the drive home, Miller gave Kauffmann $300.00 of the money which Elliott had given Miller, saying it was a payment for the purchase of Fixaco (R. 748). Miller asked Kauffmann if he would take the rest of the tablets to Kauffmann's house because Miller could not store them at the laundromat. Kauffmann agreed, took them home and placed them in a storeroom at his motel (R. 748).

Kauffmann further testified that he had been working with Chubet on imports prior to August, 1966, and that both Chang and Chubet were present at his home on that date (R. 750). Agent Elliott came to Kauffmann's home on that date and Chang, Chubet and Kauffmann discussed imports with Elliott. Also discussed was the fact that Chang could get an order for 10,000,000 amphetamine tablets for export to Formosa (R. 751). Kauffmann testified he did not know whether Elliott took any tablets with him on February 5, but that he could have done so since the key to the room where they were kept was available to anyone (R. 754).

Kauffman admitted delivering the tablets to Columbia and Blue Springs on February 21, 1967, at the request of Miller and that he was accompanied on that trip by Chubet (R. 754). He testified he received $300.00 at Columbia and $800.00 at Blue Springs (R. 756). Kauffmann said he gave the $1100.00 to Miller on his return, and that Miller gave it back to him and told him it was for Fixaco (R. 757). Kauffmann gave Chubet $1000.00 of the money to help him in paying the expenses of their export business (R. 757). Kauffmann said he did not make any further deliveries of the tablets until his arrest. He also testified he became suspicious of the operation and advised Henry Geerdes, a deputy sheriff, of his suspicions. Geerdes told Kauffmann that he (Geerdes) made the delivery on February 24, 1967, and gave Kauffmann the money he received. Kauffmann gave the money to Miller (R. 761).

Kauffmann also testified that before every delivery he received instructions from Miller when to meet and where (R. 761).

Kauffmann later testified and admitted to the deliveries made on March 8, 1967, to Wentzville, by Geerdes (R. 771) and the last delivery made by him on April 3, 1967 (R. 722). He stated that, in all, he had purchased 1,500,000 amphetamine tablets and 150,000 aspirin tablets from Shaw (R. 773-774).

In rebuttal, Geerdes testified that Kauffman had never asked him to investigate, nor did Geerdes ever tell Kauffmann he would take over the investigation (R. 1099).

The jury returned a verdict of guilty on all eleven counts against Appellant and the Court

sentenced him to a total of two years in prison.

ARGUMENT

1. In Escobedo v. Illinois, 378 U.S. 478, 12 L.ed.2d 977, 84 S.Ct. 1758 (1964), this court said that when the investigatory process switches to the accusatory, a suspect must be warned -- advised of his right to counsel. Therefore, "can a suspect be 'set up, i.e., entrapped?"

It would appear that the Escobedo line of cases would make it legally impossible for a suspect to be so entrapped. It would seem that at the crucial point, before the accused commits the intended crime, he must be warned of his privilege against self-incrimination and his right to counsel. Being warned he obviously would not commit the act, i.e., be entrapped.

In Escobedo, Justice White, in his dissent stated that:

> "Under this new approach (of the majority in Escobedo) one might just as well argue that a potential defendant is constitutionally entitled to a lawyer before, not after he commits a crime, since it is when that crucial and incriminating evidence is put within the reach of the government by the would-be accused." 378 U.S. 478 at 497.

Justice White could have anticipated the problems with respect to entrapment and in his view, the majority of Escobedo was reaching the position that one cannot commit a crime in the

presence of knowing police officers without the assistance of counsel.

2. Is it necessary to plead guilty in order to afford oneself the defense of entrapment? There are no United States Supreme Court cases on this exact point. But the California Supreme Court has ruled on it. In People v. Perez, 62 Cal. 2d 769, 401 P.2d 934 (1965), the California Supreme Court overruled many of its prior cases to the contrary when it took the position that an admission of guilt is no longer a prerequisite to plead the defense of entrapment. Thus, a defendant can say, "I did not do it" but "If I did it, I was entrapped." This is much the same as a denial coupled with an affirmative defense in a civil action.

3. In Pointer v. Texas, 380 U.S. 400, 13 L.ed.2d 923, 85 S.Ct. 1065, (1965), the Texas Court had convicted a defendant on a lower court transcript of the preliminary hearing where defendant had been unrepresented. This transcript was offered and received in the upper trial court over the hearsay objection to the witness not present.

They said, the "confrontation clause" of the Sixth Amendment is a fundamental right, and is made obligatory on the states by the Fourteenth Amendment. The "confrontation clause" provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with witnesses against him.

In a companion case, Douglas v. Alabama, 380 U.S. 415, 13 L.ed.2d 934, 85 S.Ct. 1074 (1965), the Supreme Court held that the "confrontation clause" was violated when the

prosecution, in the guise of cross-examination to refresh the recollection of a hostile witness who invoked the privilege against self-incrimination when called to testify, read the confession of the witness, preceding each few questions with the phrase, "did you make this statement?"

Since the invocation of the privilege by the witness deprived the defendant of the opportunity effectively to cross-examine him, the court held that the "confrontation clause" was violated even though the reading of the confession by the prosecutor coupled with the refusal to answer by the witness was "technically not testimony."

In the instant case, the United States Attorney opened the case describing and enumerating each and every item that Dallas Barr (alias Jerry Miller) would later testify. The record then and thereafter is replete with references to Barr (or Miller) beginning with the first witness for the prosecution. While this may be considered "technically not testimony," we respectfully submit that petitioner was deprived of the opportunity to effectively cross-examine a real accusor and witness.

4. We respectfully submit, without further authority, that 21 USC 372 (e)(5), which permits agents of the Bureau of Drug Abuse Control to seize without libel or warrant, drugs, devices and other material if the agents have reasonable grounds to believe that said items are subject to seizure and condemnation under the provisions of 21 USC 334(a)(2) is a direct violation of the letter as well as the spirit of the Fourth Amendment to the United States Constitution which states that "The right of the people to be secure

in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Bernard J. Chubet, Jr.
Petitioner

January, 1970

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,203

John R. Kauffmann,

Appellant,

v.

United States of America,

Appellee.

No. 19,232

Bernard J. Chubet, Jr.,

Appellant,

v.

United States of America,

Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[August 11, 1969.]

Before VAN OOSTERHOUT, Chief Judge; VOGEL and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

The defendants, John R. Kauffmann and Bernard J. Chubet, Jr., appeal from judgments of conviction in the United States District Court for the Eastern District of

Missouri. The defendants were jointly charged with five others for the illegal possession and sale of amphetamine tablets in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301, *et seq.* and with a conspiracy to violate the Act. The defendants were charged in an indictment consisting of eleven counts as follows:

COUNT	DEFENDANTS CHARGED	AMPHETAMINE	DATE	PLACE
I	Kauffmann, Keith, Chang & Chubet	Conspiracy under 21 U.S.C. §360(a)(b) and 21 U.S.C. §331(q)(2).		
II	Kauffmann, Keith, Chang & Chubet	Sale	Feb. 1, 1967	Bridgeton, Mo.
III	Kauffmann, Keith, Chang & Chubet	Possession	Feb. 1, 1967	
IV	Kauffmann, Keith, Chang & Chubet	Sale	Feb. 5, 1967	Imperial, Mo.
V	Kauffmann, Keith, Chang & Chubet	Possession	Feb. 5, 1967	
VI	Kauffmann, Keith, Chang, B. Kauffmann & Chubet	Sale	Mar. 8, 1967	Imperial, Mo.
VII	Kauffmann, Keith, Chang, B. Kauffmann & Chubet	Possession	Mar. 8, 1967	
VIII	Kauffmann, Keith, Chang, Geerdes & Chubet	Sale	Mar. 8, 1967	Wentzville, Mo.
IX	Kauffmann, Keith, Chang, Geerdes & Chubet	Possession	Mar. 8, 1967	
X	Kauffmann, Keith, Chang, Jared & Chubet	Sale	Apr. 3, 1967	Wentzville, Mo.
XI	Kauffmann, Keith, Chang, Jared & Chubet	Possession	Apr. 3, 1967	

The defendants were found guilty as charged by a jury on each count and sentenced to one year imprisonment on each count—Counts I through V to be served concurrent with Count I; Counts VII through XI to be served concurrent with Count VI; and, Count VI to be served consecutive to Count I.

We first consider Kauffmann's contentions.

Kauffmann contends that each of his convictions should be set aside because:

(1) The trial court erred in failing to suppress, prior to trial, evidence consisting of fourteen boxes allegedly containing amphetamine tablets and in later permitting the government to make an offer of proof in the sight and hearing of the jury prior to excluding the evidence when the evidence was obtained through an illegal search and seizure;

(2) The trial court erred in failing to suppress, prior to trial, evidence consisting of two metal drums and photographs of the contents of the drums showing that the drums contained amphetamines and cement and in permitting the government to introduce the drums and photographs in evidence when the evidence was obtained through an illegal search and seizure; and

(3) The trial court erred in denying the defendant's motion for a mistrial at the close of all the evidence wherein the defendant contended that the prosecuting attorney was guilty of prejudicial misconduct in failing to call a government informer as a witness when the prosecutor in his opening argument had stated that he would.

SEARCH AND SEIZURE

The boxes seized by the government were taken from a motel owned by Kauffmann in Imperial, Missouri, and from a store front, rented by Kauffmann and utilized as a warehouse, in House Springs, Missouri. The seizure took place on April 3, 1967, following Kauffmann's arrest.

The metal drums were seized in New York City on April 4, 1967. They had been shipped to New York City by

Kauffmann for export to Taiwan on March 13, 1967. BEDAC (Bureau of Drug Abuse Control) agents were aware of this shipment. When the shipment reached New York, agents of BEDAC accompanied custom agents who opened the drums at the freight terminal on March 21, 1967.

The government contended below and here that the evidence was not obtained as the result of an illegal search and seizure. The government argues that the agents had the authority to seize the evidence under 21 U.S.C. §372 (e)(5) which authorizes agents of BEDAC to seize without warrant or libel drugs and other material if the agents have reason to believe that they are being sold in violation of the Act. Thus, the government contends that the evidence was admissible even though it was seized without a warrant and not incident to an arrest.

We find it unnecessary, under the concurrent sentence rule, to consider whether the evidence was improperly seized. The evidence Kauffmann complains of was completely unrelated to Counts II and VI, and these counts are not otherwise assailed on this appeal. See, *Peterson* v. *United States,* 405 F.2d 102 (8th Cir. 1968), *cert. denied,* ... U.S. ... (1969); *Wangrow* v. *United States,* 399 F.2d 106 (8th Cir.), *cert. denied,* 393 U.S. 933 (1968); *Barnes* v. *United States,* 197 F.2d 271 (8th Cir. 1952). Indeed, the evidence is unrelated to any of the counts charging sale and possession.

Kauffmann admits that he made the sales and deliveries as charged in Counts II and VI at Bridgeton and Imperial, Missouri, on February 1 and March 8, 1967, respectively. Apart from his admission, the government proved the two charges conclusively. Elliott, an agent for BEDAC, testified that he purchased 50,000 tablets from Kauffmann on

February 1, 1967, and that he purchased 100,000 tablets on March 8, 1967, from Kauffmann. The tablets that Elliott purchased were introduced into evidence at trial and expert witnesses (chemists) testified that samples taken from the boxes established that the tablets purchased were amphetamines.

Kauffmann does not contend on this appeal that he was entrapped, nor does he contend that it was error to receive in evidence the tablets purchased by Agent Elliott or that this evidence was insufficient to sustain the conviction.

The evidence seized in Missouri was taken on April 3, 1967. The evidence seized in New York was taken on April 4, 1967, after the drums had been opened and inspected on March 21, 1967. Thus, in both cases, the evidence was obtained by the government between two and six weeks after the sales had been made to a government agent.

We think that it is clear from the record that the evidence seized was completely unrelated to Counts II and VI. This is not a fruit from the poisonous tree case. *Cf.*, *Williams* v. *United States*, 382 F.2d 48 (5th Cir. 1967). We are unable to see how the defendant's conviction on Counts II and VI, indeed on any of the counts charging sale and possession, was affected by the evidence seized.

We are aware of the recent decision of the Supreme Court in *Benton* v. *Maryland*, ... U.S. ..., 23 L.Ed.2d 707, 89 S.Ct. ... (1969), which cautioned appellate courts on the use of the concurrent sentence rule. However, the Supreme Court recognized that there are circumstances when an appellate court, in the exercise of its discretion, may decline to rule on every allegation put forth by a party. Such is the case here. The danger that adverse collateral legal consequences might flow from a failure to

rule on every allegation regarding these misdemeanor counts is remote. *Cf., Cantrell v. United States*, Misc. No. 614 (8th Cir. July 25, 1969) (Per Curiam).

FAILURE TO CALL A WITNESS

We find no merit in Kauffmann's contention that the prosecuting attorney's failure to call Jerry Miller as a witness after stating that he would do so in his opening statement constituted prejudicial misconduct.

The defendant contends that the record is replete with references to Miller beginning with the first witness for the prosecution. Kauffmann contends that if Miller had been called by the government, it could have shed light on his defense of entrapment.

The controlling question is the prosecutor's good faith or lack of it in stating what he expected to prove in his opening statement and whether the statement was prejudicial to the defendant. *Gladden* v. *Frazier*, 388 F.2d 777, 779 (9th Cir. 1968).

We have carefully examined the record and do not believe that the defendant was prejudiced by the government's failure to call Miller. Miller was available to be called as an adverse witness. Miller's status as a paid informer and exconvict was fully established as was the fact that he had functioned as an informer in other cases.

We now turn to Chubet's contentions.

Chubet's assertion that he was entrapped by the government agents as a matter of law is wholly without merit.

The trial court submitted the issue of entrapment to the jury with proper instructions as to both defendants. There

is a serious question as to whether the court was justified in submitting the issue as to Chubet.

While there was some evidence, *i.e.*, Kauffmann's testimony, from which a jury might find that Kauffmann was entrapped, the evidence would by no means require such a finding as to him. There was a direct conflict as to the testimony between the government agents and the defendants. The jury was free to accept the testimony of the agents. If they did so, it is clear that Kauffmann was not entrapped.

There is no evidence in the record to indicate that Chubet was entrapped. To find that Chubet was entrapped, the jury would have had to find that Kauffmann was entrapped and that his entrapment necessarily resulted in Chubet suffering the same fate. When the defense of entrapment fell as to Kauffmann, it necessarily collapsed as to Chubet. *Cf., People* v. *Ficke,* 343 Ill. 367, 175 N.E. 543 (1931).

Chubet, at trial, denied all participation in the illegal dealings. While there is some authority for the proposition that a defendant must admit guilt to raise the defense of entrapment, we need not decide that issue. See, *Kibby* v. *United States,* 372 F.2d 598 (8th Cir. 1967).

Chubet also contended that the government's failure to call Miller was prejudicial. We reject this argument for the same reasons that we rejected it in Kauffmann's case.

The convictions in both cases are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

BERNARD J. CHUBET, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1059

BERNARD J. CHUBET, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and others were convicted in the United States District Court for the Eastern District of Missouri (I R. 15; Tr. 1312-1314) of conspiracy to sell large quantities of amphetamine pills (Count I) and various substantive offenses (Counts II through XI) (see Pet. 3-5). He was sentenced to imprisonment for two years. The conviction was affirmed by the court of appeals on August 11, 1969, in an opinion reported at 414 F.2d 1022 (Pet. App. 1-7). The petition for a writ of certiorari, filed on January 10, 1970, is substantially out of time under Rule 22-2 of

the Rules of this Court. In any event, petitioner presents no issue of substance.

The evidence for the government, so far as here material, showed that Elliott, an agent for the Food and Drug Administration, was introduced to defendant Kauffmann by an informant named Miller (Tr. 48). Kauffmann was the owner of a company which was licensed to handle drugs, and explained to the agents that he would purchase drugs and have the records show that they were shipped to Formosa through New York City (Tr. 51-52).

On February 1, 1967, Elliott, with Miller present, bought 50,000 amphetamine pills from Kauffmann for $750. These were part of a larger shipment which Kauffmann had in his possession (Tr. 52-54). On February 5, Elliott met petitioner Chubet and one Chang at Kauffmann's home. Elliott told them that he understood they were the men who were setting up the records for overseas shipment, and petitioner replied, "That's right" (Tr. 59). On February 22, Elliott had a conversation with petitioner and Kauffmann, at which Miller was present (Tr. 61). Petitioner said he had brought up the records to show the shipment of tablets to Formosa by way of New York (Tr. 62). Petitioner referred to difficulties he and Kauffmann had had in making a delivery at Blue Springs, Missouri, the prior day and talked of making a delivery at Columbia, Missouri (*ibid.*). There was evidence by agents who made these purchases in Missouri. They paid the money to Kauffmann who was accompanied by petitioner (Tr. 206-207, 272-277; see Tr. 304-306, 320-321).

There was also testimony that on March 13 Kauffmann arranged for a bill of lading on two drums sent by truck from Crystal City (Tr. 536-541). When opened at the truck terminal in New York at the direction of agents who had a notice of inspection, the drums were found to contain a plastic bag of pills and were otherwise filled with cement and rock (Tr. 570-572). The drums were seized on April 4 (Tr. 607-609).

1. In his opening statement government counsel told the jury (Tr. 37):

> With regard to the conspiracy, with regard to the sales, we will place on the stand a man by the name of Jerry Miller. Jerry Miller will tell you sometime in July of 1966 he obtained certain information. As a result of this information he will tell you he made contact with the defendant John Kauffmann. He will further tell you that he had a conversation with John Kauffmann. He will tell you that the information he received from this conversation he turned over to the government, to government agents. He supplied them with the information, and you will learn from the evidence from that point on the government acted and the government gave Jerry Miller certain instructions upon which to act.

Miller was not, however, called to testify as a witness by either the prosecution or the defense. In the testimony of government witnesses reference was made to such matters as Miller's introduction of Kauffmann to the government agents, and Miller's presence at, and his arranging for, the time and place of

the various sales involved (*e.g.*, Tr. 48, 50-53, 55, 60, 80, 204, 216-217, 239, 259-260, 472-473, 521-522). The trial court sustained objections as to what Miller had said on such occasions (*e.g.*, Tr. 50, 63, 76). Cross-examination of government agents disclosed that they knew that Miller was an ex-convict with a previous felony conviction for possession of counterfeit plates, and that he was serving as a paid informant for the federal government (Tr. 116-118, 123, 126, 151-152, 499, 516-517). Both at the close of the government's case (Tr. 690) and at the close of all the evidence (Tr. 1106-1107), the court overruled co-defendant Kauffmann's request for a mistrial on the ground that the defense had been prejudiced by the government's failure to call Miller as a witness. In closing argument, counsel for both Kauffmann (Tr. 1162) and petitioner (Tr. 1201, 1213) commented upon the failure by the government to call Miller.

Petitioner contends that since government counsel in his opening statement indicated he would call the informant, Miller, as a witness, but later decided not to do so, petitioner was prejudicially deprived of his right to cross-examination of Miller under the confrontation clause of the Sixth Amendment (Pet. 16-17). This argument overlooks the fact that, while government witnesses mentioned acts by Miller, the trial court sustained objections to any statements allegedly made by him when referred to by other witnesses. The situation here is thus unlike that in *Pointer* v. *Texas*, 380 U.S. 400, and *Douglas* v. *Alabama*, 380 U.S. 415, where statements by absent wit-

nesses were used against the accused, and petitioner's reliance on those cases (Pet. 16-17) is misplaced.

In any event, the opening statement referred primarily to Miller's relationship with Kauffmann rather than with petitioner. Since Miller was available to both sides, no unfavorable inference could properly be drawn from the government's failure to call him. See *Wagner* v. *United States*, 264 F. 2d 524, 531 (C.A. 9), certiorari denied, 360 U.S. 936; *Johnson* v. *United States*, 291 F. 2d 150, 155 (C.A. 8), certiorari denied, 368 U.S. 880.

2. Testifying on his own behalf, petitioner denied any participation in the sales involved (Tr. 1080). In its final charge the court mentioned that petitioner had denied any participation in the transactions charged, his position being that "if he unknowingly committed any of the acts charged in Counts 2 through 11, inclusive, of the indictment, he did so as the result of the unlawful entrapment initiated and executed by the agents" (Tr. 1259-1260). Later the court instructed that both petitioner and co-defendant Kauffmann were asserting the defense of unlawful entrapment and pointed out the difference between unlawful and lawful entrapment (Tr. 1277-1278). The court concluded by instructing that if the defendants "or either of them, had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the government, then the defense of unlawful entrapment is a good defense, and the jury should acquit the said de-

fendants, John R. Kauffmann and/or Bernard J. Chubet, Jr., so entrapped" (Tr. 1278).

While the phrase "lawful entrapment" is hardly felicitous, the court's charge properly and adequately informed the jury of the essential nature of the defense of entrapment. Petitioner was allowed the benefit of this defense even though he denied participating in the criminal activity. Nothing in *Escobedo* v. *Illinois*, 378 U.S. 478, makes it mandatory that a criminal be warned of his privilege against self-incrimination and his right to counsel *before* he commits an intended crime (see Pet. 15-16).

3. With regard to the seizure of the drums, petitioner contends that 21 U.S.C. (Supp. IV) 372(e)(5), which permits an agent of the Bureau of Drug Abuse Control to "make, prior to the institution of libel proceedings under section 334(a)(2) of this title, seizures of drugs or containers or of equipment, punches, dies, plates, stones, labeling, or other things, if they are, or he has reasonable grounds to believe that they are, subject to seizure and condemnation under such section 334(a)(2)," violates the Fourth Amendment (Pet. 17-18). The court of appeals declined to reach the question since petitioner's sentences were supported by the substantive counts charging sale and possession before the date of seizure (Pet. App. 4-6). At all events, since the seizure is preliminary to an action for forfeiture and condemnation of drugs dangerous to health, Congress could, consonant with the Fourth Amendment's test of reasonableness, permit seizure without a warrant, based on a determination of probable cause.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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